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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-244

In the Matter of the Imprisonment of
Larry Little,

Petitioner.

****

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

PETITION FOR WRIT OF CERTIORARI

****

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PETITION FOR A WRIT OF CERTIORARI
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The petitioner, Larry Little, prays that a writ of certiorari issue to review the judgment made by the Superior Court Division, General Court of Justice of Forsyth County, entered March 18, 1971, denying habeas corpus to petitioner, which judgment the Supreme Court of North Carolina refused to review by its denial of petition for writ of certiorari entered June 10, 1971.

OPINIONS BELOW

The order of the Superior Court Division of the General Court of Justice of Forsyth County, North Carolina, in this case is not reported. A copy of the order is appended to this petition. Petitions for writ of certiorari to review this decision were denied by the North Carolina Court of Appeals and the Supreme Court of

North Carolina without opinion. Copies of the orders of these Courts denying petitions for writs of certiorari are appended to this petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina denying petition for writ of certiorari to review the judgment denying habeas corpus, was made and entered June 10, 1971. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

1. Whether the accused in a criminal case, who is without a defense attorney, constitutionally can be held to be in contempt of court, when he states in his argument that he is a political prisoner and that the court has prejudged the case and is biased.

2. Whether a judge constitutionally may rule upon contempt charges he has brought against the accused in a criminal case for stating in his argument that the court is biased and has prejudged the case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT I.

Congress shall make no law respecting

an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

General Statutes of North Carolina:

N.C.G.S. 5-1 (1)

Contempts Enumerated; Common Law Repealed.--Any person guilty of any of the following acts may be punished for contempt:

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

N.C.G.S. 5-4

Punishment.--Punishment for contempt for matters set forth in the preceding sections shall be by fine not to exceed two hundred and fifty dollars, or imprisonment not to exceed thirty days, or both, in the discretion of the court.

N.C.G.S. 5-5

Summary Punishment for Direct Contempt.--Contempt committed in the

immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every committal, attachment or process in the nature of an execution founded on such judgment or order.

N.C.G.S. 5-6

Courts and Officers Empowered to Punish.--Every justice of the peace, referee, commissioner, judge of a court inferior to the superior court, magistrate, or judge, justice, or clerk of the General Court of Justice, or member of the board of commissioners of each county, or member of the Utilities Commission or Industrial Commission, has the power to punish for contempt while sitting for the trial of causes or while engaged in official duties.

N.C.G.S. 5-9

Trial of Proceedings in Contempt.--Proceedings as for contempt shall be by an order directing the offender to appear within a reasonable time and show cause why he should not be attached for contempt. In all proceedings for contempt and in proceedings as for

> contempt, the judge or other judicial officer who issues the rule or notice to the respondent may make the same returnable before some other judge or judicial officer. When the personal conduct of the judge or other judicial officer or his fitness to hold his judicial position is involved, it is his duty to make the rule or notice returnable before some other judge or officer. Nothing herein contained shall apply to any act or conduct committed in the presence of the court and tending to hinder or delay the due administration of the law, nor to proceedings for the disobedience of a judicial order rendered in any pending action.

STATEMENT OF THE CASE

This proceeding arises in the Superior Court Division of the General Court of Justice of Forsyth County, North Carolina. Petitioner filed an application for writ of habeas corpus with the clerk of that court on March 16, 1971, seeking the release from his confinement by the sheriff and jailer of Forsyth County, pursuant to an order holding petitioner to be in contempt of the district court division of that court and sentencing him to a term of thirty days in jail, on the same grounds that are stated in the present petition. Writ of habeas corpus was

issued, and the matter was heard in the Superior Court on March 18, 1971; on that date the court entered its judgment denying habeas corpus. Petitioner sought review of this judgment by petition for writ of certiorari to the North Carolina Court of Appeals; the court entered its order on May 12, 1971, denying the petition. Petitioner further sought review of the judgment by petition for writ of certiorari in the Supreme Court of North Carolina; the court denied the petition by order entered June 10, 1971.

The questions presented here, that is the constitutionality of holding petitioner, the accused in a criminal case appearing without counsel, in contempt for arguing that the court was biased and had prejudged the case and that the accused was a political prisoner, and the constitutionality of the court's sitting in judgment of the accused in the contempt proceedings when the judge had been alleged to be biased and prejudiced, were timely and properly raised in the Superior Court on the face of petitioner's petition for writ of habeas corpus, and in the North Carolina Court of Appeals and the Supreme Court of North Carolina, on the face of petitioner's petitions for writs of certiorari.

The Superior Court, in its judgment denying habeas corpus, held that petitioner's arguments that the court was biased and prejudiced and that the petitioner was a political prisoner amounted

to direct contempt of court and that the district court had the authority to punish petitioner for this conduct. The North Carolina Court of Appeals and the Supreme Court of North Carolina, by declining to allow petitions for certiorari, did not pass upon the merits of petitioner's constitutional claims. (App. pp. 20-25 , hereof)

Petitioner was held in direct contempt of court and was sentenced to be confined to the common jail of Forsyth County for a term of thirty days, on March 8, 1971, by A. Lincoln Sherk, Judge of the District Court Division of the Forsyth County General Court of Justice. Petitioner was a defendant in the criminal session of the district court over which Judge Sherk was presiding on March 8, 1971. The charge against petitioner was carrying a concealed weapon in violation of N.C.G.S. 14-269. When the case was called for trial, petitioner filed a written motion for continuance on the ground that his privately retained attorney had conflicts in district court in Charlotte, making it impossible for him to be in Winston-Salem. Petitioner's counsel, Joseph H. Tieger, of Charlotte, had written to James Yates, the solicitor assigned to the district court, a letter dated March 2, 1971, requesting a continuance of petitioner's case until some time in April because of conflicts in the attorney's schedule which would make him unavailable during most of the month of March. Judge Sherk denied petitioner's

motion for continuance. It then became incumbent upon petitioner to represent himself without counsel.

After the close of the evidence on the charge of carrying a concealed weapon, petitioner argued the case on his own behalf. The court found that during petitioner's argument:

> (1) That the defendant stated the Court was bias [sic].
>
> (2) That he was [sic] political prisoner.
>
> (3) That the Court had pre-judged the case.

As appears in Judge Sherk's order, "the Court at this point informed petitioner that he was in contempt as the Court felt that these remarks were very disrespectful and tended to subvert and prevent justice." The court also concluded that these remarks "reflected on the integrity of the Court. . ." Judge Sherk thereupon sentenced petitioner for contempt of court. There were no findings in Judge Sherk's order that petitioner's conduct in any way interfered with, or threatened to interfere with, the order and regularity of the proceedings in the court. (App., pp. 18-19, hereof)

On March 16, 1971, petitioner filed his application for writ of habeas corpus in the Superior Court Division of the

Forsyth County General Court of Justice. The writ of habeas corpus was issued the same day by Superior Court Judge Charles T. Kivett, who on March 18, 1971, presided at the hearing of the habeas corpus proceeding. In accordance with the judge's ruling that matters extrinsic to the contempt order could not be considered, no evidence was offered in the habeas corpus proceeding, and the court had before it only the order holding petitioner in contempt and the arguments of counsel. The Superior Court denied habeas corpus, finding that petitioner's words as quoted above, being uttered in the presence, immediate view and hearing of the court and those assembled in the court, directly tended to interrupt its proceedings and to impair the respect due the district court's authority, and hence, were in violation of N.C.G.S. 5-1 (1). In the judgment holding petitioner in contempt of court, it was found that he called Judge Sherk a "M----- F-----," as he was being removed from the courtroom by a deputy sheriff, after having been held in contempt of court; the superior court did not consider this utterance as having a bearing on the contempt judgment. The superior court ordered that petitioner be released from confinement on a $500.00 bond, pending exhaustion of certiorari proceedings in the higher courts. (App., pp. 20-23 , hereof)

ARGUMENT

The decision below should be reviewed

because the Supreme Court of North Carolina has refused to review and reverse a decision of one of the trial tribunals of North Carolina, that decided a federal question of substance not heretofore determined by this Court, and decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court.

1. An accused in a criminal case, who is without a defense attorney, constitutionally cannot be held in contempt of court for stating in his argument that he is a political prisoner and that the court has prejudged the case and is biased.

Summary punishment for contempt, without the usual notice and trial, is limited, Cooke v. United States, 267 U.S. 517, 536 (1925), to those acts that pose "such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public. . .[that if it] is not instantly suppressed and punished, demoralization of the court's authority will follow." This limitation is applicable to state contempt proceedings, through the Fourteenth Amendment. Craig v. Harney, 331 U.S. 367 (1947).

It is universally recognized that counsel must be given wide latitude in their arguments. They must be permitted to express their contentions sharply and vigorously. e.g., State v. Barefoot, 241

N.C. 650, 86 S.E.2d 424 (1955) An even broader discretion must be granted to the layman who argues his own case. See Powell v. Alabama, 287 U.S. 45 (1932).

The only conduct for which petitioner was adjudged contemptuous in this case was his statements in the closing argument that the court was biased and had prejudged the case, and that the defendant was a political prisoner. Undoubtedly petitioner concluded that the denial of petitioner's written motion for a continuance in order to secure the attendance of his attorney, was an indication of hostility by the judge against him. By giving vent to these feelings in his closing argument, petitioner perhaps was not helping his own cause, but the contempt powers are not to be invoked simply because one is not acting in his enlightened self-interest. In making these remarks petitioner was tactless, but contempt is a remedy too drastic to be invoked merely for the enforcement of niceties of etiquette. There is no showing in the record that petitioner's voice was loud or that his tone was abusive. There is no showing in the record that a disturbance in the courtroom ensued, or was likely to ensue. The record does not disclose any interruption of the court's proceedings.

In the order holding petitioner in contempt of court, Judge Sherk's primary emphasis was upon the disrespectfulness of the remarks and their reflection on

the judge's integrity. An expression of disrespect for a judge, not coupled with an interference with the administration of justice, is an insufficient basis for a contempt judgment. "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil. . .[T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Craig v. Harney, 331 U.S. 367, 376 (1947). "Trial courts. . .must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." Brown v. United States, 356 U.S. 148, 153 (1958). The contempt power, like other restraints upon free expression, constitutionally can be invoked only to protect against a clear and present danger to the fair and orderly administration of justice. Pennekamp v. Florida, 328 U.S. 331, 348 (1946). And the criminal contempt power must be limited "in its exercise to 'the least possible power adequate to the end proposed'. . .[and the end proposed] is not to impose vengeance for an insult to the court,. . ." Brown v. United States, 356 U.S. 148, 163 (1958) (Brennan, J. dissenting). In the present case there is no indication that petitioner would -

not have heeded a warning from the court that the argument was exceeding tolerable bounds; if a warning might have been sufficient to protect the court's proceedings, a thirty day jail sentence surely was excessive.

This Court has been careful to protect counsel, who are vigorously espousing their clients' causes, against punishment for contempt. In Re McConnell, 370 U.S. 230, 235 (1962), counsel insisted on asking a certain line of questions in order to protect his rights on appeal, the court ordered that the questioning be terminated, and the lawyer responded, ". . .we have a right to ask the questions, and we propose to do so unless some bailiff stops us." This Court decided it could not clearly be shown on the record that these statements actually obstructed the district judge in the performance of judicial duties, and the contempt conviction was reversed. The Court placed emphasis on the fact that after making the quoted statement, the attorney did not ask any more questions along the line which the judge had forbidden, so that it was never necessary for the court to order that the proceeding be interrupted. In the present case, of course, there was no interruption of the proceedings.

In Holt v. Virginia, 381 U.S. 131 (1965), an attorney filed motions requesting a trial judge to disqualify himself and for a change of venue, alleging bias on the part of the judge. In the motion for change of venue, the attorney alleged

that the judge intimidated and harrassed his client. The court found these motions contemptuous. This Court reversed, saying, "It is not charged that petitioners here disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties. Their convictions rest on nothing whatever except allegations made in motions for change of venue and disqualification of Judge Holladay because of alleged bias on his part." 381 U.S. 136.

Every defendant in a criminal action has the Sixth Amendment right "to be heard in his defense--a right to his day in court--" In Re Oliver, 333 U.S. 257 (1948). Here petitioner was doing no more than exercising the right to be heard in his own defense. The words he uttered may have been ill-chosen, but they were constitutionally protected and not contemptuous. If a lawyer is permitted the latitude allowed in Re McConnell and Holt v. Virginia, then certainly a layman without any legal training should be given an even wider latitude to argue his case. It also must be remembered that petitioner was not prepared for trial and had hoped that his case would be continued; he had expected to be represented by counsel and instead learned on the day of the trial that he had to defend himself.

Under all of these circumstances, it cannot be held that petitioner's conduct amounted to such a clear and present

danger to the orderly and fair administration of justice that the state judge was acting within constitutional bounds when he punished petitioner for contempt.

2. A judge constitutionally may not rule upon contempt charges he has brought against the accused in a criminal case for stating in his argument that the court is biased and has prejudged the case.

The remarks for which petitioner was held in contempt consisted of allegations that the court was biased and prejudiced against him. In holding that petitioner was in contempt, Judge Sherk emphasized primarily the disrespectful nature of the remarks and their reflection on the integrity of the court.

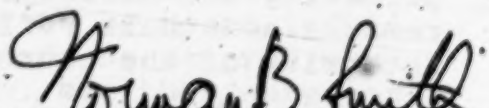
Mayberry v. Pennsylvania, ___ U.S. ___, 39 U.S.L.W. 4133 (1971) holds that where the contemnor attacks the integrity of the judge, the judge is disqualified from sitting in the contempt proceeding. In that case, as in the present case, a defendant was representing himself in a criminal action. The contemnor accused the judge of being a "hatchet man for the State," accused the judge of trying to gag him, and at various points in the trial directed personal epithets against the judge. The court concluded that the Fourteenth Amendment required that the contemnor be given a public trial before a judge other than the one whose integrity

he had attacked. The Court noted that otherwise there is too great a potential for bias and too great a possibility that the judge would respond to a personal grievance in hearing the contempt proceeding.

The present case is controlled by Mayberry v. Pennsylvania. It was constitutional error for Judge Sherk not to have transferred the contempt charges for hearing by another judge.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for writ of certiorari should be granted.



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APPENDIX TO PETITION

[NORTH CAROLINA] [GENERAL COURT OF JUSTICE]

[FORSYTH COUNTY] [DISTRICT COURT DIVISION]

[STATE OF NORTH CAROLINA	)	
	)	
v.	)	[ORDER]
	)	
LARRY LITTLE,	)	
	)	
Defendant.]	)	

1. This case came on for trial before the undersigned District Court Judge in Winston-Salem, North Carolina on March 8th, 1971, and the Court finds as a fact, that during the course of the trial and immediately there after the following events occurred:

1. That the defendant stated that the Court was bias.

2. That he was a political prisoner.

3. That the Court had pre-judged the case.

2. The Court at this point informed the defendant that he was in contempt as the Court felt that these remarks were very disrespectful and tended to subvert and prevent justice.

3. As the defendant was being removed

from the courtroom by deputy sheriff, he spoke out and called the undersigned presiding judge a M----- F-----.

The court concludes on the foregoing facts that the conduct of the defendant and the words spoken by him in the presence of the Court were contemptious; that they refelcted on the integrity of the Court and tended to subvert and prevent justice, and the defendant is there above held in contempt of this Court.

It is Ordered and Adjudged and Decreed that the defendant be imprisoned in the common jail of Forsyth County for a term of 30 days.

This 8th day of March, 1971.

/s/ A. L. Sherk
Presiding Judge

STATE OF NORTH CAROLINA — GENERAL COURT OF JUSTICE

COUNTY OF FORSYTH — SUPERIOR COURT DIVISION

IN THE MATTER OF)
IMPRISONMENT OF) JUDGMENT OF
LARRY LITTLE) THE COURT

This matter coming on to be heard and being heard before the undersigned Judge Presiding, upon the application for and issuance of a Writ of Habeas Corpus filed by the applicant, Larry Little.

The Court finds that the Honorable A. Lincoln Sherk, Judge of the District Court presiding over the District Division of the Forsyth County General Court of Justice on the date of March 8, 1971, found the applicant, Larry Little, in direct contempt of court on said date; that the defendant had been arrested under a warrant issued on February 5, 1971, for the offense of carrying a concealed weapon and that he was placed on trial under said warrant for said offense on the date of March 8, 1971; that the applicant was unrepresented by counsel at his trial on said date; that at the conclusion of his trial Judge Sherk found that "During the course of the trial and immediately thereafter the following events occurred: (1) that the defendant stated that the Court was bias (sic). (2) that he was a political prisoner. And (3) that the Court had

pre-judged the case." The Court further finds that at that point, Judge Sherk informed the defendant that he was "in contempt as the Court felt these remarks were very disrespectful and tended to subvert and prevent justice;" that Judge Sherk further found that as the defendant was being removed from the courtroom by a deputy sheriff, he spoke out and called the undersigned Presiding Judge a "M _ _ _ _ F _ _ _ _ _ ;" that Judge Sherk then concluded "on the forgoing facts that the conduct of the defendant and the words spoken by him in the presence of the Court were contempteous; that they reflected on the integrity of the Court and tended to subvert and prevent justice, and the defendant is thereabove held in contempt of this court;" that Judge Sherk then "ordered and adjudged and decreed that the defendant be imprisoned in the common jail of Forsyth County for a term of thirty days."

This Court finds from the record of the District Court that District Court Judge, A. Lincoln Sherk, found that the applicant, Larry Little, in open court at and in the presence and hearing of the Court and during and following the trial of the defendant for the offense of carrying a concealed weapon, was in direct contempt of court. This Court finds, from the record, also, that the District Court had jurisdiction of the defendant and the subject matter of the trial; that the District Court had the authority on the said date to punish the defendant for

contempt of Court, under the authority of North Carolina G. S. Chapter 5 Section 1, and other sections following, and under the authority of North Carolina G. S. Chapter 7-A, Section 29; that the District Court did not exceed that authority; that the conduct of the applicant in using the words "that the Court was bias (sic) and, that the applicant was a political prisoner and that the Court had prejudged the case" amounted to a direct contempt of court under North Carolina G. S. Chapter 5 Section 1 (1)in that such words uttered in the presence, immediate view and hearing of the Court and those assembled in the court, directly tended to interupt its proceedings and to impair the respect due the District Court's authority; that the finding by the District Court that the words used "reflected on the integrity of the Court and tended to subvert and prevent justice" amounted to a finding by the District Court that the words were willfull and intentionally used and that the words used tended to interrupt the Court's proceedings and to impair the respect due its authority.

THEREFORE the Court finds that the applicant is not being restrained of his liberties in violation of the Constitutions or laws of the United States or the State of North Carolina.

It is directed that the applicant be returned to the place from whence he came to continue service of his sentence for direct contempt of the District Court of

Forsyth County, North Carolina.

This the 18th day of March, 1971.

/s/ Charles T. Kivett
Charles T. Kivett
Judge Presiding

NO. 71SC152PC TWENTY-FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

Spring Term, 1971

****

IN THE MATTER OF)
THE IMPRISONMENT OF) From Forsyth
LARRY LITTLE)

****

Petition for Writ of Certiorari denied by order of the Court in conference,

This the 12th day of May, 1971.

NO. 67PC TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1971

****

IN THE MATTER OF)
THE IMPRISONMENT OF) From Forsyth
LARRY LITTLE)

****

Petition for Writ of Certiorari denied by order of the Court in conference.

This the 10th day of June, 1971.

/s/ Moore, J.
Moore, J., For the Court